Neutral Citation Number: [2019] EWHC 2890 (Ch)

Case Nos. 2718 & 2719 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (Ch D)

IN THE MATTER OF PAG ASSET PRESERVATION LIMITED
AND IN THE MATTER OF MBV VACANT PROPERTY SOLUTIONS LIMITED

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ
Date: 30/10/2019

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between:

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Petitioner

-and-

PAG ASSET PRESERVATION LIMITED

Respondent

Between:

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Petitioner

-and-

MB VACANT PROPERTY SOLUTIONS LIMITED

Respondent

- -

Paul Chaisty QC and Lucy Wilson-Barnes (instructed by **Gowling WLG, Birmingham**) for the **Petitioner**

David Chivers QC and Nicholas Trompeter (instructed by **Gorvins, Stockport**) for the **Respondents**

Hearing dates: 24, 24, 26, 27 September & 1 October 2019
Draft judgment circulated: 11 October 2019

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction and summary of decision

1. The Secretary of State for Business, Energy and Industrial Strategy ("the SOS") petitions under section 124A of the Insolvency Act 1986 ("the Insolvency Act") to wind up two companies, PAG Asset Preservation Limited ("PAGAPL") and MB Vacant Property Solutions Limited ("MBV") (collectively "the Companies"), on public interest grounds.

2. PAGAPL has operated, and MBV continues to operate, what the SOS describes as a rates avoidance scheme and what the Companies describe as a rates mitigation scheme. (Since there is no difference of substance as opposed to perceived perception between the two descriptions, and since the SOS does not suggest that it is a rates evasion scheme, I shall refer to it as a rates avoidance scheme.)

3. Under this scheme (referred to as "Scheme 3", because it is the third such scheme operated by the individuals behind the Companies) owners of commercial property (I shall refer to them as "landlords") can avoid paying national non-domestic rates ("business rates", also known as "NNDR") on empty commercial properties owned by them. This is achieved by leasing the property to a special purpose vehicle company ("SPV") incorporated by the Companies which is then placed into members' voluntary liquidation ("MVL"). The effect of the lease is that the SPV becomes the owner of the property in place of the landlords for the purpose of liability for business rates. The effect of the MVL is that the SPV is relieved of liability to pay business rates, because one of the exemptions from such liability as provided by the rating legislation is for companies which are being wound up, whether compulsorily or voluntarily.

4. Although the SOS does not contend that the incorporation of the SPVs or the grant of the leases or the entry into MVLs are contrary to any specific provision(s) of the insolvency legislation or the rating legislation or are to be treated as sham transactions, nonetheless she contends in summary that the business model adopted by both companies subverts the purpose of liquidations and that such misuse of the insolvency legislation demonstrates a lack of commercial probity such that it is just and equitable to wind up the Companies.

5. In pursuing that contention (which I shall refer to as the "insolvency misuse ground") the SOS submits that Scheme 3 is no different in its essential elements from the previous scheme ("Scheme 2") operated by PAG Management Services Limited ("PAGMS"), in respect of which the Secretary of State for Business, Innovation and Skills succeeded in his petition to wind up PAGMS on public interest grounds following a trial before the then Vice-Chancellor Norris J. By his judgment in that case ("the PAGMS case") given on 9 August 2015 [2015] EWHC 2404 (Ch) Norris J decided that PAGMS should be wound up on the insolvency misuse ground.

6. The Companies contend that the differences between Scheme 2 as operated by PAGMS and Scheme 3 as operated by them are so significant that the reasons which led to Norris J deciding that it was in the public interest to wind up PAGMS do not apply to them. If they are wrong

about that they also contend that the reasons given by Norris J do not, on proper analysis, justify winding up on public interest grounds and they invite me not to follow his decision.

7. During the course of the trial which proceeded before me over 5 days I heard from a number of witnesses to whom I refer below and had the benefit of excellent written and oral submissions from Mr Chaisty QC leading Ms Wilson-Barnes for the SOS and Mr Chivers QC leading Mr Trompeter for the Companies, to each of whom I am indebted. I am also grateful to the respective solicitors for the production of the evidence and bundles, both in hard and in electronic form.

8. Having considered the evidence and the submissions my decision is that the SOS has not made out her case that the Companies or either of them should be wound up on public interest grounds.

9. I give my reasons below under the following headings:
   (A) The witnesses [paragraphs 10 to 16]
   (B) The relevant rating legislation [paragraphs 17 to 30]
   (C) Public interest winding up – the relevant legal principles [paragraphs 31 to 35]
   (D) The Companies [paragraphs 36 to 40]
   (E) Schemes 1 and 2 [paragraphs 41 to 42]
   (F) The judgment of Norris J in the PAGMS case [paragraphs 43 to 49]
   (G) Scheme 3 [paragraphs 50 to 82]
   (H) The Petitions [paragraphs 83 to 100]
   (I) The purpose of members voluntary liquidation (MVL) [paragraphs 101 to 116]
   (J) Application of the above principles to the facts of this case [paragraphs 117 to 133]

(A) The witnesses

10. The SOS adduced evidence from 3 witnesses: (a) Mr Hope, a chief investigator with the Insolvency Service who was responsible for the investigation into the Companies which led to the decision to present the petitions; (b) Mr Simpson, who undertook the investigation under the supervision of Mr Hope; (c) Ms Maskell, a senior policy adviser within that branch of the Insolvency Service which is responsible for the regulation of the bodies who themselves regulate insolvency practitioners such as the two liquidators who were appointed to conduct the MVLs of the SPVs involved in Scheme 3. As would be expected none of them had first-hand knowledge of the operation of Scheme 3 by the Companies. Mr Simpson presented the information which he had obtained as a result of his investigation into the Companies and Ms Maskell presented the information which she had obtained as a result of information obtained from enquiries made regarding the two liquidators. Unsurprisingly, no issues as to their honesty or reliability arise for my determination.

11. The Companies adduced evidence from 3 witnesses who gave evidence at trial.

12. Mr Stanley is a licensed insolvency practitioner who acted as liquidator to 11 of the SPVs involved in this case. He had also acted as liquidator in relation to a number of the SPVs

involved in Scheme 2. He gave evidence of his involvement in relation to one such SPV as being representative of his involvement with all of them. He was honest and reliable and clearly held a genuine belief that he was entitled to act as liquidator of these SPVs without placing himself in conflict with his professional obligations. This belief was based upon his view that the changes made to the scheme were sufficient to permit him to accept new appointments as a liquidator from the Companies. There was no criticism by the SOS of his conduct as liquidator and, insofar as relevant to my decision, I am satisfied that there is no basis for any such criticism.

13. Mr Cook is the managing director of a property development group which has used the schemes offered initially by the Property Alliance Group Limited ("PAG") and subsequently by PAGMS and latterly the Companies for many years. He gave evidence in the previous trial which was described by Norris J as impressive. He was an impressive witness and I accept his evidence.

14. Mr Gough is a director of and shareholder in both of the Companies and responsible for the operation of Scheme 3. He was an honest witness and – in the main – a reliable historian. Indeed, as Mr Chaisty QC acknowledged, he was disarmingly candid in much of his oral evidence – as indeed he had been both in interview and in his witness statement – as to the Companies' intentions in making the changes which they did to the schemes. It seemed to me that Mr Gough was properly conscious of the importance to him personally of giving evidence which could not subsequently be demonstrated to have been untrue and was therefore determined to ensure that he did not give misleading evidence.

15. The Companies had also adduced a witness statement from a Mr Vaughan-Jones, who is a director of a company which had also used the schemes offered by PAG and whose evidence was substantially the same as that of Mr Cook. He did not attend trial. It was said that the reason was that his employers had not wanted him to attend trial. However, as Mr Chaisty observed, since he is a director of the company that raised certain questions about who it was had instructed him not to attend, which were not explained. Nonetheless, since his evidence largely duplicated that of Mr Cook and was not sufficiently controversial that the SOS felt it necessary to reply to it, I give it some weight.

16. Finally, I should record that the Companies had also obtained a witness statement from a Mr Power, a licensed insolvency practitioner with extensive experience of acting as a liquidator but with no personal involvement in Scheme 3 or knowledge of other directly relevant matters. The SOS objected to the admission of this evidence on the ground that it contained a mixture of irrelevant factual evidence and irrelevant or inadmissible opinion evidence, where no application for permission had been made for him to give expert evidence and nor had he purported to comply with the obligations imposed upon an independent expert witness. I ruled in favour of the SOS on the first day of the trial as a result of which his witness statement was not admitted. I should record that one of the principal factors which led me to exercise my discretion against admitting his evidence was that there was nothing of real importance in his evidence which was not already covered by the evidence of Mr Stanley anyway.

(B) The relevant rating legislation

17. In his judgment in the PAGMS case Norris J succinctly explained the relevant business rates legislation in these terms:

> "1. Section 45 of the Local Government Finance Act 1988 imposes a liability to pay business rates (called "a national non-domestic rate" and usually referred to as "NNDR") upon hereditaments if four conditions are satisfied. One of the conditions is that the hereditament must fall within a class prescribed by regulations. Regulation 3 of the Non Domestic Rating (Unoccupied Property) (England) Regulations 2008 (SI 2008/386) prescribed all non-domestic hereditaments other than those exempted by Regulation 4. Regulation 4(k) of the 2008 Regulations exempted:-
>
> "Any hereditament…whose owner is a company which is subject to a winding up order made under the Insolvency Act 1986 or which is being wound up voluntarily under that Act".

18. There was no dispute before me as to the effect of the business rates legislation. As Mr Chivers observed, it does not distinguish between companies in MVL or in creditors voluntary liquidation ("CVL") even though there are – as I will address in more detail below – significant differences between the two types of voluntary liquidation.

19. Furthermore, in his opening submissions Mr Chivers referred me to certain matters relevant to the operation of the rating legislation which he submitted were relevant when considering the question of the public interest. It was only in 2008 that the amount charged by way of business rates on empty property increased from 50% to 100% of that payable on occupied property. It is apparent that the timing of this increase, coinciding as it did with the onset of the recession in the property market due to the financial crisis, made criticism of the business rating legislation, including its application to empty property, ever more vocal and rates avoidance schemes ever more popular. He referred me to papers including discussion papers produced by the Department for Communities and Local Government in 2012, 2014 and 2015 and a report produced by the House of Commons Business, Innovation and Skills Committee in 2014 in which these criticisms were recorded, as was the perception that the scale of rates avoidance was growing. It was noted that the four most common methods of avoidance involved the use of: (a) repeated periods of artificial occupation; (b) artificial occupation by charities; (c) artificial ownership and intended use by charities; and (d) the use of insolvency exemptions. However, although the Committee recommended a wholesale review, nothing has happened since, at least so far as England is concerned (I refer to Scotland and Wales below.)

20. On 17 July 2013 the general anti-abuse rule ("GAAR") found in Part 5 of the Finance Act 2013 came into effect and conferred on HMRC specific anti-avoidance powers in relation to certain categories of tax (initially, income tax, corporation tax, capital gains tax, petroleum revenue tax, inheritance tax, stamp duty land tax, and annual tax on enveloped dwellings). Notwithstanding the scale of business rates avoidance described in the papers and report referred to above Parliament evidently did not consider it appropriate to include business rates within the scope of GAAR when Part 5 of the 2013 Act was first enacted and has not considered it appropriate to do so at any time since then.

21. In contrast to the position in England, in Scotland there is a proposal, contained in Part 4 of the Non-Domestic Rates (Scotland) Bill, entitled 'Anti-Avoidance Regulations' which, if enacted, will confer power on the Scottish Ministers to make by regulations such provision as they consider appropriate with a view to preventing or minimising advantages arising from artificial non-domestic rates avoidance arrangements. Likewise, in Wales a consultation paper has been produced seeking views on the introduction of anti-avoidance measures to similar effect.

22. Relying upon this evidence Mr Chivers submitted that: (a) there is nothing in the rating legislation which leads to the conclusion that rates avoidance schemes which use artificial means to take advantage of the insolvency exemption are in themselves contrary to any expressly stated purpose of the business rates legislation; (b) there is nothing in the material emanating from government or from parliamentary committees which leads to a similar conclusion; and (c) at least as regards England, there is no existing enactment or proposed enactment which would prevent the use of such schemes is in force or under consideration.

23. Moreover, as he submitted, in the PAGMS case it was specifically argued by the SOS that the business of PAGMS was artificial and demonstrated a lack of commercial probity as regards the object of the scheme itself, namely the avoidance of business rates. By reference to the material before him, which was similar to although a little less extensive than that placed before me, Norris J rejected that submission and it has not been advanced by the SOS in the instant petitions. Having referred to the evidence Norris J concluded at [60] that:

> "On this evidence it is not possible to find that NNDR avoidance/mitigation schemes are contrary to the public interest (though they may be): nor would it in principle be right for the Court in one case to resolve what is essentially a far-reaching economic and political question that is properly the province of Parliament".

And he continued at [62] that:

> "62. A further reason for this conclusion is that I am not persuaded that companies and partnerships that offer tax mitigation schemes (I say nothing of tax evasion schemes) are in general carrying on a business which is inherently objectionable even if the products offered are highly artificial. There are many such companies and partnerships, some of which are of the highest repute."

Rossendale BC v Hurstwood [2019] EWCA Civ 364

24. Mr Chivers also drew my attention to the fact that since the judgment of Norris J in the PAGMS case there has been an attempt by two local authorities to challenge the effectiveness of the artificial use of the insolvency exemption which has failed both at first instance and in the Court of Appeal.

25. In turn HHJ Hodge QC, sitting as a High Court Judge in the Liverpool Chancery Division, and the Court of Appeal were asked to determine applications to strike out two claims brought by two local authorities, one of which was a claim brought by Wigan Council against PAG, on the

basis that the landlords were liable for business rates as opposed to the SPVs to which they had granted leases. The two cases were in the nature of test cases because, as David Richards LJ noted at [4], a total of 55 claims had been issued including, so Mr Chivers said, claims involving both Scheme 2 cases and one Scheme 3 case. The Court of Appeal, accepting submissions made by Mr Trompeter, junior counsel for the Companies in this case, held that the claims should be struck out on the basis that the two principal grounds which were advanced by the claimants could not succeed. The first was a claim based on piercing the corporate veil of the SPVs in question (so as, in effect, to treat the leases as of no effect). Giving the leading judgment on that issue David Richards LJ concluded that it could not succeed. The second was a claim based on the application of the *Ramsay* principle. Giving the leading judgment on that issue Henderson LJ concluded that it could not succeed either.

26. It is not suggested that the claim based on piercing the corporate veil is of any direct relevance to this case. Although David Richards LJ made a passing reference to the decision of Norris J in the PAGMS case at [27] of his judgment, that was simply to note that, if the cases were allowed to proceed to trial, it would be open to the local authorities to argue that, contrary to the view taken by Norris J, the business rates avoidance schemes were contrary to the public interest. David Richards LJ did not need to and nor did he express any view one way or another as to the correctness of the decision of Norris J in that regard. He did however make the following observation at [49] upon which Mr Chivers placed some reliance:

> "The use of companies to avoid the incidence of tax or NDR [business rates] can hardly be described as rare or novel. They are frequently inserted in tax avoidance schemes for no reason other than to mitigate or avoid the incidence of one form or another of taxation. Further, as the Judge said in his judgment at [3], it has been recognised for a considerable time that ratepayers or potential ratepayers can and do organise their affairs so as to avoid liability to pay rates."

27. That observation however was not intended as a reference to the use of the insolvency process to avoid the incidence of business rates and, hence, is of no direct relevance to the issues which arise in this case.

28. In considering the significance of the judgment of Henderson LJ as to whether or not the *Ramsay* principle arguably applied to this case it is important to bear in mind that the question which he was addressing was whether there was any scope for applying a purposive construction to the business rating legislation so as to enable the local authorities to argue that the requirement for the SPVs to be the "owner" of the property was not satisfied because it was not the "real" owner of the property. Henderson LJ rejected at [73] the argument that the concept of ownership in the business rating legislation could be the subject of a wider, purposive construction He continued, in a passage which Mr Chivers submits is relevant to the SOS' case here as regards the insolvency misuse ground, as follows at [74]:

> "Counsel for the claimants sought to persuade us, in their written and oral submissions, that there was at least arguably still scope for the *Ramsay* principle to operate, with the consequence that the actions should not be struck out and there should be a full

investigation of the facts at trial after the parties had fully pleaded their respective cases and disclosure had taken place. In their written argument, they submitted that "the notion of an owner of a hereditament as a person entitled to possession has to be interpreted purposively as an owner with a real entitlement to possession, such that an SPV whose only reason for existence was to accept a lease, with no commercial purpose other than to avoid the liability to pay [national non-domestic rates], is not the owner of a hereditament." The fundamental problem with this submission, however, is that it elides the steps which have to be followed in deciding whether a *Ramsay* approach is possible. One step must always be to construe the relevant legislation, to see whether it admits of a *Ramsay* approach. For that purpose, it is not enough (as cases like *MacNiven* and *BMBF* show) merely to point to the tax-avoidance motive of the ratepayer, or the pre-ordained nature of the transactions which are undertaken, or to aver that the SPV company's entitlement to possession is "unreal" where it has been brought into existence for the sole purpose of taking the lease. As I have sought to explain, the concept of entitlement to possession in section 65(1) of the 1988 Act is an intrinsically legal one, which is satisfied the moment that a valid lease to the SPV company has been executed. Where the relevant concept is of such a nature, the tax avoidance motivation of the parties and the artificiality of the arrangements become irrelevant, because they have nothing to do with the relevant legal concept."

29. Henderson LJ also referred to the judgment of Mann J in *Westbrook Dolphin Square Ltd v Friends Life Ltd (No2)* [2014] EWHC 2433 (Ch), [2015] 1 WLR 1713, where the judge in addressing a similar argument said, pithily, that:

> "130. One is therefore looking for words which have to be interpreted. One is not looking to a general sort of "Parliament cannot have intended to allow this sort of thing" approach. It is a tighter approach than that.
>
> …
>
> 135. In my view this exposes the argument for what it is, which is not so much an attempt to construe words in the statute, but to divine a purpose behind a provision in the statute, extract that purpose and then apply a principle that a person should not be able to evade that purpose because it was Parliament's purpose."

30. The SOS is not seeking here to support her case by contending that the *Ramsay* principle is applicable, either to the insolvency legislation as a whole or to any of its particular provisions. However, Mr Chivers submits, rightly in my view, that the judgment of Henderson LJ is of some importance because it demonstrates that in the context of the arguments being advanced by the SOS it is necessary to focus on the true purpose of the insolvency legislation as regards MVLs when considering whether that purpose is misused in Scheme 3.

(C) Public interest winding up – the relevant legal principles

31. That point brings me on to the principles which apply to public interest winding up cases. In his judgment in the PAGMS case Norris J succinctly summarised the principles to be adopted in the exercise of the public interest winding up jurisdiction in these terms:

"5. There was a large measure of agreement about the principles to be adopted in the exercise of this jurisdiction. The principles I shall apply are these:-

a) Even if the SoS thinks it expedient in the public interest to wind up a company, the Court still has a discretion whether or not to make an order.

b) Before making an order the Court must be satisfied that it is just and equitable to wind the company up.

c) The burden of proof lies on the SoS to persuade the Court (having proved matters of fact to the requisite civil standard) that it is just and equitable to wind the company up.

d) The Court must balance competing reasons why the company should be wound up and why it should not be wound up upon a consideration of the totality of the evidence (per Nicholls LJ in *Re Walter L Jacob & Co Limited* [1989] BCLC 345 at 353 b-d).

e) As a result of undertaking that exercise the Court must be able to identify for itself the aspects of the public interest which would be promoted by making a winding up order in the particular case (ibid at p353f);

f) It is not necessary for the business of the company to involve illegality. As Millett LJ said in *Re Senator Hanseatische* [1997] 1 WLR 515 at 522h:-

> "On the contrary the phrases used (namely "expedient in the public interest" and "just and equitable") to my mind indicate that Parliament did not intend to impose such a restriction but instead simply decided to leave to the Secretary of State to form a view as to what was expedient in the public interest and the court then to decide on the material before it whether the justice and equity of the case dictated that the company concerned should be wound up".

g) Where the business of the company does not involve the commission of illegal acts or breaches of regulatory requirements the company may nonetheless be wound up if its business is "inherently objectionable" because its activities are contrary to a clearly identified public interest. So in *Abacrombie & Co Limited* [2008] EWHC 2520 (Ch) the company operated a debtor advisory service. David Richards J explained:-

> "The purpose of the company's business as it related to clients with equity in their residential property was, prior to the client's bankruptcy, to sell the equity to the client's spouse or partner at as low a price as possible and to use the proceeds to fund the company's charges which were both excessive and unjustifiably charged to the debtor client. The effect, as the company…well appreciated, was to deprive the debtor's estate of any substantial return or value from the debtor's beneficial interest which was likely to have been the only asset of any substance. The effect was detrimental to creditors and undermined the proper administration of the bankruptcy of the debtor" (see paragraph [60]).

He had earlier at paragraph [15] held:-

> "The arrangements, as operated by the company, in my judgment, subverted the proper functioning of the law and procedures of bankruptcy".

h) Such conduct is sometimes described as disclosing "a lack of commercial probity", and whilst this frequently might involve preying on the public and inducing individual members of the public to participate in transactions which are without benefit to them, it can also involve prejudice to the public generally (for example by casting burdens on the general body of tax payers). An illustration of this may be found in *SoS for Business Innovation and Skills v PGMRS Limited* [2010] EWHC 2864[1] (Ch) in which four companies traded at the expense of HMRC (by not paying either VAT or PAYE) until such time as they were insolvent, conduct that the judge held represented a lack of commercial probity.

i) However in making the judgment whether a business is inherently objectionable "the court has to be careful of being priggish" (see *Re Force Sun Limited* [2002] EWHC 443 (Ch) at paragraph [26], a point which Mr Chivers QC reinforced with a submission that this was a court of law and not a court of morals. If this is simply a submission that I am bound to decide the case according to law and by reference to principle and precedent I unhesitatingly accept the submission. If this is a submission that the law in this area is devoid of moral content, then I disagree. Concepts such as "inherent objectionability" or "want of commercial probity" are bound to have some moral content, though that content is not the subjective moral perception of the individual judge, but must be informed by any discernable policy of the law and guided by the view of other judges in other cases.

j) Finally, to wind up an active and solvent company is a serious step, and the Court must be satisfied that reasons of sufficient weight have been advanced to justify taking that course (*Re Walter L Jacob & Co Limited* (supra) at p354d-e).

32. Neither Mr Chaisty nor Mr Chivers quarrelled with this summary of the applicable principles, which I adopt with gratitude. However, Mr Chivers drew my attention to two of the cases cited by Norris J in support of a submission that they did not on proper analysis establish principles of any application to the circumstances of this case.

33. As regards *Abacrombie*, he submitted that the principle stated by David Richards J had to be understood in the context of the facts of that case, which involved a debt management company operating a scheme whereby: (a) a debtor, facing bankruptcy, transferred his interest in a jointly owned house to his co-owning spouse or partner at "as low a price as possible"; and (b) once the debt management company's "excessive and unjustified" fees were deducted insufficient was left in the bankruptcy for the creditors to receive a distribution. Thus, only the spouse or partner and the debt management company benefitted. That, held David Richards J, was detrimental to creditors and undermined the proper administration of the bankruptcy of the debtor.

[1] The correct reference is [2010] EWHC 2983 (Ch).

34. Mr Chivers submitted that the holding was justified in that case because the activity under consideration was clearly contrary to the expressly stated purpose of bankruptcy legislation requiring a debtor's assets to be distributed *pari passu* amongst his creditors and where the conduct complained of, albeit occurring in advance of the bankruptcy, was intended to and did affect the conduct of the bankruptcy. He submitted that the holding only applied, as indeed do the anti-avoidance provisions of the Insolvency Act generally, to cases of insolvency, whether personal or corporate and not to MVLs which, as he explained, are not in fact insolvency procedures.

35. As regards the reference by Norris J to the *PGMRS* case, a decision of HHJ Behrens sitting as a High Court Judge, whilst Mr Chivers did not take issue with the statement that it was not necessary that there was harm to individuals and that harm to the general public, including the non-payment of tax, could suffice, he submitted that the lack of commercial probity found in that case involved a pattern of conduct by the individuals concerned in the management of the companies in question in allowing debts to HMRC to mount up, go unpaid and, when the previous companies had become insolvent, moving on to the next company. He submitted that the holding was not authority for any principle that legitimate avoidance of tax could by itself amount to a lack of commercial probity.

(D) The Companies

36. I begin by saying something about the Companies and the individuals and entities connected (in the broader sense) with them. PAGAPL was incorporated on 22 February 2017. Its owners are: (i) a company known as PAG Ventures Limited ("PAGVL"), which owns 70% of its shares; and (ii) Mr Gough, who owns the remaining 30%. Its directors are Mr Gough and Mr Hunter.

37. MBV was incorporated on 8 February 2016. The shareholding and the directors are the same as PAGAPL.

38. PAGAPL undertook business activities under Scheme 3 from April 2016 to February 2017 and MBV has undertaken business activities under Scheme 3 subsequently, effectively taking over the running of the scheme from PAGAPL which is now for all practical purposes dormant.

39. Mr Gough was in charge on a day to day basis of PAGAPL and continues to be in charge of MBV on that basis, dealing with prospective landlord clients and with liquidators and working with a small staff of two other employees. He is also the sole director and shareholder of each of the SPV companies used in Scheme 3. He had a similar role as regards PAGMS in relation to Scheme 2.

40. PAGVL is owned by the three sons of Mr David Russell who is, together with Mr Hunter and others, its director. Mr Russell was the founder of, majority shareholder in and CEO of PAG, the company which was responsible for Scheme 1 as described below, as well as the founder of PAGMS.

(E) Schemes 1 and 2

41. Again, I set out and gratefully adopt the summary by Norris J of the history of Schemes 1 and 2 in his judgment in the PAGMS case:

> "7. Until April 2008 owners of non-domestic property were entitled to benefit from some relief against NNDR in relation to empty commercial and industrial properties. But from the 1 April 2008 that relief was removed. Shortly thereafter the global financial crisis occurred which led to a property recession. PAG was faced with increasing numbers of empty properties and a general fall in rental yields. As at April 2008 approximately 25% of its commercial and industrial property portfolio was wholly or partially empty. In anticipation of the removal of relief in respect of NNDR PAG began to operate what it called "a NNDR mitigation scheme".
>
> 8. Under this initial scheme PAG set up a new company ("Newco") which entered into a lease with PAG to occupy the vacant property at a nominal rent, Newco assuming liability for the unoccupied business rates. On the day the lease commenced PAG would waive entitlement to the rent, and Newco would pass a special resolution to place itself into members' voluntary winding up. Although placed in a members' voluntary winding up, no liquidator was appointed. There was accordingly no one in office who could disclaim the lease, which would therefore simply continue until its 3 year term expired by effluxion of time (the lease generally being put in a drawer and forgotten about). If a bona fide third party tenant came along who wished to take a lease on genuine commercial terms then PAG would exercise a 7 day termination right so that the property became available to the incoming tenant with vacant possession.
>
> 9. Although initially confined to properties of which PAG was the freeholder or head leaseholder, in about May 2009 the initial scheme was developed to include other landlords. In return for being allowed to participate in the scheme these third party landlords paid PAG a fee representing a proportion (generally 30% to 40%) of the amounts of NNDR saved by using the scheme. In all 13 Newcos were established. They saved PAG about £1.5 million in NNDR, and third party scheme users about £7.4 million.
>
> 10. On the 31 May 2011 the SoS presented petitions against each of those companies for their winding up on public interest grounds. PAG decided not to oppose the petitions and winding up orders were made on the 27 July 2011. PAG itself was not the subject of a petition.
>
> 11. On the 24 August 2011 PAG Management was incorporated for the purpose of managing and coordinating the operation of a revised scheme, that being its sole trading activity. The revised scheme was almost identical to the initial scheme, save for the fact that now a liquidator was appointed as soon as the SPV entered members' voluntary liquidation."

42. He had earlier summarised in his judgment at [3] the operation of Scheme 2 in this way:-

> "(a) PAG Management incorporates a special purpose vehicle ("the SPV"):

(b) Contemporaneously PAG Management's client companies will grant leases to the SPV:

(c) The leases are generally for a term of 3 years at a rent of £1 per annum (and containing obligations as to use and repair) but terminable on 7 days' notice:

(d) Contemporaneously with the grant of the lease to the SPV the landlord waives the right to receive sums due under the lease:

(e) Contemporaneously with the grant of the leases the SPV is placed in members' voluntary liquidation (a course that is possible because, by virtue of the landlords' waiver, the directors of the SPV can make a statutory declaration of solvency):

(f) The SPV is now a company in members' voluntary winding up and is itself exempt from NNDR:

(g) The landlord (PAG Management's client company) is not in occupation of the hereditament:

(h) The members' voluntary liquidation proceeds slowly:

(i) Under a fee agreement entered into between the Landlord and PAG Management the latter receives by way of fee a percentage (varying between 15% and 40%) of the NNDR saved at a result of the lease being in place:

(j) Meanwhile the landlord refurbishes and/or markets the property and if a taker is found then the lease to the SPV is terminated and the new tenant takes occupation, no "empty rates" having been paid in the meanwhile."

(F) The judgment of Norris J in the PAGMS case

43. In order not to over-lengthen this judgment I do not propose to rehearse the detail of the arguments which were advanced before Norris J or the facts as found by him. It suffices to make the following observations.

44. Norris J did not accept many of the complaints made by the SOS as regards Scheme 2, including complaints that: (a) the leases granted by the landlords to the SPVs were shams; (b) the statutory declarations of solvency made by the directors of the SPVs could not properly have been given; (c) the scheme involved a breach of section 87(1) of the Insolvency Act (which requires that the company shall from the commencement of the winding up cease to carry on its business except for the purposes of a beneficial winding up); (d) the scheme involved a breach of sections 91 and 92 of the Insolvency Act (in that if a liquidator indicated an intention to disclaim the leases because they were of no advantage to the SPV he was removed from office and no new liquidator was appointed, so that the members' voluntary winding up became dormant).

45. As I have already said, he also did not accept the complaint by the SOS that the business of PAGMS was artificial and demonstrated a lack of commercial probity as regards the object of the scheme itself, being the avoidance of business rates.

46. However he did accept, as I have also already said, the complaints made by the SOS that Scheme 2 subverted the purpose of liquidations and that such demonstrated a lack of commercial probity such that it was just and equitable to wind up the Companies. He said this:

> "63. This leaves for consideration the remaining grounds which are an amalgam of "abuse of the insolvency legislation" and "lack of commercial probity having regard to the elements of the scheme". I hold that the SoS succeeds on this ground, that upon consideration of all the evidence it is just and equitable that PAG Management should be wound up because its activities are contrary to a clearly defined public interest, and because on balance the public interest is better served by winding up than by any other outcome."
>
> "65. I find that the business of PAG Management necessarily involves (a) the creation by PAG Management of companies which exist for no purpose other than immediately going into liquidation; (b) the creation by PAG Management of assets for the sole purpose of their being held by those companies in liquidation (subject to the right of the freeholder to recover them if the freeholder can turn them to advantage); (c) the putting in place by PAG Management of arrangements which enable it to have effective control over the conduct of these liquidations as regards the maintenance in being of those assets; and (d) the exercise of that control to secure that the liquidations continue rather than proceed to a conclusion, the real objective being that each liquidation shall act as a shelter for the assets specifically created to be held by the company in order that PAG Management might earn fees in relation to those assets. In my judgment the purpose of liquidation is the collection, realisation (though not invariably) and distribution of assets in satisfaction of the claims of creditors and the entitlements of members. The adjustments made to third party rights (whether they be stays upon enforcement or exemptions from fiscal liabilities otherwise falling upon companies) are made to achieve that purpose. I hold that there is a clear public interest in ensuring that the purpose of liquidations is not subverted, as I consider it is by treating a company in liquidation as a shelter (and seeking to prolong its continuation as such). This misuse of the insolvency legislation demonstrates a lack of commercial probity. It its own way it also "subvert[s] the proper functioning of the law and procedures of bankruptcy".

47. He dealt with the submission by Mr Chivers that there was nothing improper in using the corporate insolvency process to achieve other purposes at [67] in these terms:

> "67. Mr Chivers QC, who has great experience and high standing in this field, gave evidence from the Bar that many corporate reconstruction schemes involve the interposition of a company to receive assets and then to be wound up (perhaps for tax reasons or as a mechanism of distribution) and that it had never been suggested that this was improper; and that many schemes of very many sorts require directors to take steps which are wholly predetermined (in relation to which it was never contemplated that they would exercise

independent judgment). Of such schemes I say nothing, save that if the liquidation is not genuinely a collection and distribution of assets then its propriety might need to be reconsidered. For me it is the use of the company in liquidation as an asset shelter and the inherent bias towards prolongation of the liquidation that is subversive of the true purpose and proper functioning of insolvency law. So I cannot accept Mr Chivers QCs submission that the operation of the scheme through the medium of insolvency is not commercially improper."

48. His final conclusion was at [69]:

> "69. PAG Management is an active and solvent business. That business involves the promotion of an NNDR mitigation scheme. Of itself the promotion of tax mitigation schemes is not an inherently objectionable activity. In the course of so doing it incidentally uses artificial leases having no commercial reality and containing some terms which are mere pretences; and on occasion having procured that its creature companies enter liquidation, it has delayed appointing new officeholders. These historic events would not of themselves be of sufficient weight to warrant a winding up. But PAG Management's business model involves a misuse of the insolvency legislation in the way I have described and the SoS has satisfied me that it is just and equitable to wind up the company that I ought to exercise the discretion conferred by 124A of the 1986 Act in that way: and I will so order."

49. Norris J granted PAGMS permission to appeal, however the appeal was withdrawn before it came to be heard. It is not necessary for me to reach any conclusion as to whether that was because PAGMS knew that the appeal would fail and in the meantime those behind PAG had already set up Scheme 3 and so could afford to let the appeal go, as Mr Chaisty submitted, or for other reasons.

(G) Scheme 3

50. Mr Gough candidly explained that following the judgment of Norris J in the PAGMS case he sat down with advisers and considered ways and means in which Scheme 2 could be amended in order to meet the criticisms of Norris J whilst remaining effective as a business rates avoidance scheme and as a scheme which would be commercially attractive both to landlords and to those involved in the PAG business.

51. The result was Scheme 3 in its first iteration, which was the scheme as operated by PAGAPL. As with Scheme 2, the starting point was to find landlords with property which was or was about to become empty and who were willing to enter into the scheme. A majority of the landlords who had already taken advantage of Scheme 2 were willing to continue with Scheme 3. Other landlords also became involved. It appears that much of the business came through third party introductions from various businesses engaged in the commercial property sector and to whom PAGAPL agreed to pay a substantial commission in respect of each property which entered the scheme as a result of their introduction. Typically, Mr Gough would meet interested landlords and explain the operation of the scheme to them. Since this is not a case where the SOS complains that the scheme was mis-sold to landlords, or that the nature and

intended effect and operation of the scheme as explained to the landlords was materially different to the scheme as it operated in practice, it was not necessary to undertake a detailed examination of the selling process at trial and nor is it necessary for me to do so in this judgment.

52. The essence of Scheme 3 was similar to Scheme 2 insofar as it involved: (a) there being an SPV solely owned and controlled by PAGAPL; (b) the entry into two key agreements, the first being the fee agreement entered into between PAGAPL and the landlord and the second being a 3 year lease entered into between the SPV and the landlord; (c) as was always intended and planned in advance, the subsequent entry into MVL of the SPV; (d) the lease continuing either until the expiry of its fixed term or the landlord determining earlier, typically because it had found either a tenant on commercial terms or a buyer or had found an alternative use for the property which required it to be occupied and, hence, the benefit of being in the scheme for the purpose of avoiding the payment of business rates on the unoccupied property was no longer needed.

53. However the key difference, in my view, was the provision in the leases relating to the determination premium, the nature and effect of which I shall have to consider in some detail below.

54. So far as the SPV is concerned, although it would have been possible to have a separate SPV for each separate property, in practice what happened was that once a sufficient number of properties were identified a SPV (either a company already bought "off the shelf" or incorporated for the purpose) was selected. As I have said, Mr Gough would be the sole shareholder and the sole director of each SPV.

The fee agreements

55. The fee agreements each contained an express term under which the landlord agreed to pay a monthly fee for so long as the leases subsisted, the amount being stated to be either 30% of the business rates which would have been payable but for the scheme or a fixed fee negotiated between PAGAPL and the landlord in a similar amount.

56. The majority of the fee agreements entered into by PAGAPL also contained an express term referred to as a break penalty clause. Under this break penalty clause PAGAPL agreed to repay the landlord a substantial proportion, varying between 90% and 99%[2], of any sum paid by the landlord in respect of the determination premium under the lease. This provision, upon which the SOS placed considerable reliance, only makes sense when read with the terms of the lease, to which I now turn.

The leases

57. The leases contain recitals A and B in the following terms[3]:

> "A The landlord and the SPV are entering into this lease in good faith to transfer liability for business rates in relation to the premises to the SPV with the purpose of (amongst other

[2] Save in one case, where it was 50%.

[3] Inserting for convenience the abbreviations employed in this judgment.

things) mitigation of business rates which would otherwise be payable by the landlord … ("the Purpose")"

B The rights and obligations in this lease are subject to the Purpose …"

58. The "Permitted Use" was defined as "the use of the premises for the Purpose". As Mr Gough said, it is plain from these recitals and from the definition of the permitted use that the parties were not in any way seeking to conceal the true purpose behind their entering into the lease.

59. The rent payable under the lease was a nominal £1 per annum "if demanded". The tenant undertook various obligations as set out in Schedule 2, although nothing of any substance in the context of it being common ground that the SPV was not entitled to and was never expected to physically occupy or use the property. The SPV did however undertake to pay business rates in respect of the property "as required by law". In practice this meant that the SPV would be liable to pay business rates unless and until it went into MVL.

60. Under clause 2 it was recorded that the SPV took the lease in consideration of payment of a specified sum paid by the landlord. The specified sum varied as between the leases but was always a relatively modest amount. It is common ground that, although this was not stated on the face of the lease, the amount was equivalent to or slightly greater than the SPV's liability to the local authority for business rates from the date of the grant of the lease until the envisaged date of entry into the MVL. The evidence is that it was always envisaged that the SPV would go into MVL 7 days after the date of the lease, but 9 days business rates was paid in order to allow for any slippage and also to provide the SPV with some modest surplus in terms of cash at bank. The effect of this term was that in substance the landlord was indemnifying the SPV in advance against the SPV's pre MVL liability for business rates for which the SPV had agreed under the lease to be responsible.

The determination premium

61. As I have said, each lease had a fixed term duration of 3 years. The renewal provisions of Part 2 of the Landlord and Tenant Act 1954 were excluded. However, importantly, the landlord was able to determine (or call for the SPV to surrender) the lease at any time by notice, but conditional on payment of what was referred to as a "determination premium". The SPV as the tenant had no right of early determination. The amount of the determination premium varied according to when the lease was determined, but increased the later in the lifetime of the lease it occurred.

62. A sample lease entered into by one of the PAGAPL SPVs records that the determination premium payable was: (a) nothing up to the end of month 3; (b) the equivalent of 1 week's business rates from month 3 to the end of month 9 (c) the equivalent of 2 weeks' business rates from month 9 to the date of expiry. No payment was required to be made by the landlord if the lease simply expired after 3 years. (These steps appear to have been altered slightly under the MBV SPVs, so that after month 12 to the date of expiry the equivalent of 4 weeks' business rates would be payable instead of only 2 weeks' business rates.)

63. As the SOS submitted and Mr Gough accepted in cross-examination, and as is plainly the case, the determination premium is uncommercial, in the sense that the lease is a wasting asset so that its value as an asset is lesser rather than greater the closer to the end of the lease. Indeed, if one were to postulate that the determination premium in some way represented agreed compensation to PAGAPL through the SPV for the loss of the opportunity to receive the 30% commission under the fee agreement, logically it would be higher the sooner the determination occurred and lower the later it occurred. It is true, as Mr Gough said in cross-examination, that making determination cost free in the first 3 months was an incentive for landlords to enter the scheme even if they thought they might only need it for a short time, but otherwise the sliding scale does not make commercial sense.

64. The Companies do not dispute that the provisions relating to payment of the determination premium are entirely artificial. They fully concede that they were devised with a view to creating something of value to the SPV within the lease which was in the nature of a contingent asset since the determination premium might be paid at any time up to the date of expiry of the lease. The intended consequence was that the liquidator would not only be justified in, but positively required, all things being equal, not to disclaim the lease and instead to maintain the MVL in being for the duration of the lease so as not to lose the opportunity of receiving the crystallised contingent asset represented by the determination premium should the landlord exercise his right of determination.

65. It is not in dispute that many landlords did in fact determine their leases prior to expiry of the 3 year term. As was said in evidence, and as makes obvious commercial sense, no landlord would choose to hold on to the lease, even if to do so would enable it to avoid payment of business rates, if it had the option of turning the property to profitable use, whether by selling it or renting it to a genuine tenant on commercial terms or otherwise.

66. Nor is it in dispute that in respect of those landlords who did determine and paid the determination premium those payments were refunded by PAGAPL under the break penalty provision of the fee agreement. (In fact, in a number of case the refund was paid by MBV after PAGAPL had ceased trading, but nothing turns on this.) Mr Gough agreed that the reason for including this provision in the first place was to make Scheme 3 commercially attractive to landlords who might otherwise balk at taking on this additional prospective liability.

67. Although Mr Chaisty cross-examined Mr Gough on the basis that this was in reality a circular transaction, in fact, as Mr Chivers submitted, that was not on a proper legal analysis correct, unless proper grounds exist for disregarding the separate corporate personalities of PAGAPL and the SPV. That is because the true position is that: (a) the landlord pays the SPV; (b) PAGAPL repays the landlord; (c) no monies change hands as between the SPV and PAGAPL – the most that may be said is that on completion of the winding up the amount paid by the landlord, less all relevant debts and expenses, would be distributed to Mr Gough as sole member of the SPV.

68. Thus, as the SOS rightly accepted: (a) the leases were genuine (albeit artificial) legal contracts with genuine (again albeit artificial) terms as to determination premium; and (b) the

determination premiums were genuinely paid by the landlord to the SPV if and when they became due, even if the landlord was subsequently refunded almost all such payments by PAGAPL.

69. In the second iteration of Scheme 3, which broadly speaking coincided with the change from PAGAPL to MBV, the provisions of the fee agreements which required PAGAPL to repay the determination premium to the landlord were removed. Mr Gough admitted that one reason for removing these provisions was the concern that they could give rise to a perception that the Companies were funding the scheme. He said that another reason was that by this time Scheme 3 was established and successful and he did not consider it necessary to have to incentivise landlords to enter their properties into the Scheme by including a contractual provision for a refund. However he did admit that if a landlord with whom he was discussing entering a property into Scheme 3 asked him to agree a refund (which existing landlords, who had already used the scheme and were aware of the provision, might well naturally do) he would agree in order to maintain the relationship. He said that it was made clear that this was not a refund but that MBV was prepared to agree to a reduction in the fees payable under the fee agreement instead as a form of loyalty bonus.

70. There was some issue as to whether MBV was giving this loyalty bonus to all of its landlords. When he was asked Mr Gough said that it did not do so, especially more recently, when it had not been given particularly often[4]. He was taken to the analysis conducted by Mr Simpson in his second witness statement, which recorded that from his analysis of MBV's records he had identified 19 instances where there had been a determination at the time of his investigation, of which MBV had refunded the landlord in 18 such cases, 16 of which had related to PAGAPL SPV leases (i.e. where there was a contractual obligation under the fee agreement) and the remaining 2 of which related to MBV SPV leases (where there was no such obligation). The second witness statement of Mr Stanley recorded that since Mr Simpson's investigation many more leases have now been determined. The SOS had not asked MBV for information to enable it to ascertain in what proportion of the leases determined to date a refund or a reduction in the commission payment had been paid or given and nor has MBV volunteered such information. Accordingly, the only evidence I have is as referred to above. Mr Chaisty invited me to conclude that this practice was still widespread, notwithstanding the evidence of Mr Gough to the contrary. I do not consider that I can or should reach this conclusion. I have already said that Mr Gough was honest and mainly reliable and indeed disarmingly candid; if it had been the case that MBV had been and still was refunding, directly or indirectly, landlords who paid determination premiums in the vast majority of cases, I am satisfied that he would have said so.

Services provided by the SPVs to the landlords

71. This was the subject of some investigation in the course of the trial. The starting point is that under the PAGAPL leases provision was made for the SPV to provide certain services but only on the basis that: (a) its obligation was only to "provide or procure the provision of such of the services as it deems necessary"; (b) the landlord paid the cost of providing those services in advance where required. In the sample lease referred to at trial the services were described as

[4] Initially he said "very few" landlords got this loyalty bonus but the immediately volunteered that this was not correct.

pest control services, where £100 was payable for an initial set up and £308 for 8 subsequent visits over the course of the first year of the lease. It is common ground that this work was sub-contracted to third party contractors and that the SPV charged the landlord at cost plus a modest profit add-on. Other leases contained provisions for other services to be provided, most frequently a keyholder service on a similar basis to that described above. The SPV would invoice the landlord concerned for these services, typically some days before the entry into the lease itself. This invoice might be combined with the invoice for the initial rates charge or might be a separate invoice. In either case that advance payment would allow the SPV to pay the third party contractor before it went into MVL and it also provided a little cash surplus in its bank account at the time of the MVL.

72. In contrast, under the MBV SPV leases there was no equivalent provision for services. Mr Gough was asked why. His evidence was that initially there were two reasons why it was decided to include this provision for services in the PAGAPL SPV leases. The first, he readily admitted, was to seek to address potential criticism of the scheme that the lease was completely artificial. It appears to have been considered that providing services in the (newly introduced) 7 day window between lease and MVL would support an argument that the leases were neither shams nor wholly artificial. Sensibly, since the SOS has not pursued an argument that the leases were shams, the Companies have not felt it necessary to pursue an argument that the provision for services rendered the leases non-artificial.

73. However, Mr Gough also explained that at the time he at least believed that there was a commercial opportunity for PAGAPL to expand the scope of its services to landlords and to provide a full property management service for the vacant properties the subject of the leases. Whilst he readily accepted that many landlords were substantial and experienced property companies who were fully able to undertake or procure such property management services as they might need, he said that nonetheless he believed that there was scope for offering this service in some cases. He said that it became apparent, however, that this optimism was misplaced and that the landlords did not in fact want to take up this opportunity. It was for principally this reason that the reference in the leases to the provision of services was removed in the MBV SPV leases. His evidence was that nonetheless services were still offered to landlords and many took them up. When he was cross-examined about this he readily accepted that he would explain to landlords both whilst PAGAPL was operating and subsequently once MBV had taken over that it would assist the prospects of successfully defending any challenge to the efficacy of the arrangement by local authorities if the landlords agreed to take some services. He said that many landlords agreed to do so on that basis although in those circumstances it would be a modest service provision such as the keyholder service. He did not therefore disagree with the proposition that this was essentially artificial since the only reason the service was offered and accepted was to seek to enhance the prospects of the leases achieving their intention of allowing the landlords to avoid payment of business rates. However, I am satisfied that insofar as is relevant his evidence on this point was credible and that the services were actually provided, invoiced and paid for.

The MVLs

74. It is of course an integral part of Scheme 3 that each SPV should go into MVL. Under Scheme 2 the going into MVL was simultaneous with the entering into of leases with the landlords. It appears that when Scheme 3 was devised it was decided to introduce a 7 day time lapse between the grant of the lease and the entry into MVL. This appears to have been intended to overcome any argument that the lease or the MVL were sham transactions and to address concerns apparently expressed by the bodies which regulated the liquidators involved in Scheme 2. However nothing of substance turns on that change.

75. Before Scheme 3 started to operate Mr Gough had already had discussions with Mr Stanley with a view to explaining how the scheme would operate and securing his confirmation that he would be willing in principle to accept appointments under Scheme 3 MVLs. Mr Stanley confirmed that he would. It is clear that he was reassured that the differences between Scheme 2 and Scheme 3 were sufficiently substantial for him to feel comfortable in accepting appointments under Scheme 3. It is also clear that he was keen for the business to come the way of his firm. It was agreed that he should be entitled to charge £75 per month per extant lease as remuneration for his services as a liquidator. Although there was a reference made by Mr Gough in his interview to Mr Stanley's firm having given "advice" in relation to Scheme 3 I am satisfied that this was not advice strictly so called as opposed to confirmation of Mr Stanley's willingness to act.

76. Mr Stanley was cross-examined on the basis that he had conducted little if any real due diligence before accepting appointments. I do not consider that this criticism was justified. I am satisfied that he was entitled to conclude that the key difference between Scheme 2 and Scheme 3, being the provisions for the payment of the determination premium, entirely justified him in concluding that it was legitimate for him as a liquidator to accept an appointment and to continue the MVL for as long as the leases remained extant in order to ensure that the prospect of those contingent assets materialising was not prejudiced. I am satisfied that he genuinely believed that he might be liable for misfeasance if he determined the leases whilst there remained a real prospect of a determination premium being paid and that there was no basis for seeking to conclude the MVL in the meantime. I am also satisfied that he conducted the due diligence necessary in each individual appointment he accepted. In my judgment it was not his responsibility to consider whether or not Scheme 3 as a whole might be said to offend against the public interest or to decline to accept an appointment on the basis that there was a risk that it might.

77. There was no criticism (or basis for criticism, in my judgment) of the level of fees which he charged or of his decision to require a deed of indemnity from Mr Gough to secure payment of his fees. I deal with the question of the deed of indemnity in more detail below when considering certain specific criticisms made in the petitions.

78. Mr Stanley was prepared to accept that there might be circumstances where he might have to bring the MVL to an end even if one or more leases remained extant, for example where he considered that there was no real prospect of further determination premiums being paid. However, there is no evidence that circumstances of this kind have ever actually materialised. Indeed, it is clear from the updated evidence in his second statement that in relation to three of

the MVLs all of the leases held by the SPVs in question have been determined with determination premiums being paid and that in the remaining 8 cases at least some determination premiums have been received.

79. In addition to Mr Stanley the Companies also used the services of another liquidator, a Mr Steven Wiseglass, who had also acted as liquidator in relation to some of the Scheme 2 SPVs. Although some documentation is available in relation to those MVLs Mr Wiseglass did not provide a witness statement or give evidence. According to Mr Gough that was because he did not wish to do so and he denied that the Companies had sought to persuade him from not giving evidence. Given that the Companies were evidently perfectly happy for Mr Stanley to give evidence I am quite satisfied that it is not a case of the Companies seeking to avoid calling a witness because they were concerned about the evidence he might give. The evidence discloses that Mr Wiseglass was rather more assiduous in securing prompt payment for his services as liquidator than was Mr Stanley, so that on a number of occasions he requested, and Mr Gough agreed, to provide an advance to Mr Wiseglass pending realisations. Mr Gough was cross-examined on the basis that the effect of this was to prolong the MVLs. He was referred to an email from Mr Wiseglass dated 18 May 2018 to the effect that, unless he was placed in funds for his fees, the company would be insolvent and "I will have to convert the company from solvent liquidation to an insolvent liquidation, which I am sure you wish to avoid". Again, I will refer to this email in more detail when considering the allegations made in the petitions but it suffices to say here that I find nothing sinister in this.

80. So far as the conduct of the MVLs is concerned there is, as I have said, no criticism of the liquidators in terms of their performance of their statutory functions as liquidators. Mr Chaisty cross-examined Mr Stanley on the basis that Mr Stanley was entitled and indeed obliged to act as he did in maintaining the SPVs in MVL because of the terms of the leases and, in particular, the determination premium provisions, and Mr Stanley agreed. Mr Gough was asked in cross-examination about the basis behind the valuation of what was referred to as the "lease break fees" in the declaration of solvency. He was unable to say much more than that they were estimates. However, since this case has not been advanced or presented on the basis that Mr Gough failed to perform his statutory duties in this respect, it is not entirely surprising that he had not come prepared to answer that question and I do not place any weight on his inability to do so. The reality is that whilst it was possible to place a value on the determination premium, since that was provided for in the lease, it was – at least until the scheme had been in operation for some time – difficult if not impossible to form a view as to the likelihood of the landlord exercising its right to determine and if so when that might happen.

81. It is common ground that the leases had no assignment value and that the liquidators took no steps to seek to market them for that reason. It is common ground that the only assets within the SPVs were the contingent assets represented by the determination premium provisions and such cash at bank as had been received from the landlords pursuant to the initial invoice for pre-MVL rates and any services. A net residue would remain once the services had been paid for and rates liability discharged. As regards the liquidators' fees it appears that Mr Stanley was prepared to wait for sufficient realisations to come in by way of determination premiums whereas, as I have said, Mr Wiseglass would want payment up front and would receive it from

Mr Gough by way of advance. The creditors of the SPV were, once the initial rates liability and any service provision had been paid for, exceedingly modest. The liquidators did not undertake any activity which required expenditure so that, as I have understood it, the only creditors would be: (a) local authorities (insofar as it appears that there may in some cases have been some other property ownership related charges which they were entitled to levy, such as what is known as a BID levy, for which under the fee agreements the landlords were liable to reimburse the SPV in any event); and (b) HMRC in relation to VAT and any corporation tax payable on realised profits.

82. The evidence of Mr Stanley was that of the 175 leases held by the 11 SPVs of which he was liquidator a total of 107 had been surrendered as at 31 March 2019 with the prospect of more being surrendered during the remaining lifetime of the leases. There is no indication that the SPVs of which Mr Wiseglass is liquidator are in a fundamentally different position. Although there was some cross-examination by Mr Chaisty of Mr Stanley to the effect that it appeared that not all of the determination premiums payable had been collected in by him, there was no basis in my view for any suggestion that Mr Stanley was deliberately dragging his feet in this regard with a view to prolonging the course of the liquidations.

(H) The Petitions

83. Mr Chivers submitted, rightly, that the case against the Companies can only properly be considered by reference to the case as advanced in the petitions as explained in the replies to the two requests for further information of the petitions submitted by the Companies.

84. The key element underlying the SOS' case in the petitions is what is referred to at [17] as the "Common Element" which is integral to the operation of the Schemes and is required to ensure that business rates are not payable. This is said to involve the incorporation or acquisition of the SPV with the intention of being placed into MVL; the entry by the SPV into leases with landlords for the sole purpose of being held by the SPV; and the SPV being placed into MVL so that the liability for business rates is avoided.

85. There is no dispute about this. The Companies admit that the Common Element is indeed present in and integral to the successful operation of Scheme 3. The question is whether or not the operation of Scheme 3 in accordance with the Common Element means, as the SOS contends at [61] that "the Companies lack commercial probity in their operation of Scheme 3 which misuses and/or abuses and/or subverts the insolvency legislation and process".

86. Particulars of the allegation in [61] are given in [62] to [69]. These have been subjected to close scrutiny by Mr Chivers. In my view the most important particular is to be found at [62], which alleges that because the Common Element is employed as an integral part of Scheme 3 it continues to misuse and subvert the insolvency legislation for the purpose of avoiding liability for business rates rather than the liquidation of a company.

87. The remaining particulars may be summarised together as necessary with the Companies' response and my observations flowing from my findings as to the operation of Scheme 3 above as follows.

88. It is alleged in [63] that the leases are created solely to be held by the SPV which is to be put into and remain in MVL for the term of the leases. There is no dispute that this is the case.

89. It is alleged in [64] that the inherent intention is to continue and prolong the MVLs for as long as possible until the lease is determined by the landlord or expires after 3 years rather than the priority being the collection and distribution of assets. The particulars relied upon are the provision of the deed of indemnity to the liquidators and the statement by Mr Wiseglass to Mr Gough in the email dated 18 May 2018 referred to above.

90. I agree with Mr Chivers that this allegation does not reflect the true position. It is true that the intention is to continue the MVLs until all leases held by the SPVs are either determined or expire after 3 years. However, that is not the same as intending to "prolong" the MVLs by seeking to achieve an outcome whereby the MVLs are continued beyond the time when the assets would have been realised and distributed. Under Scheme 3 the liquidator will not know until all of the leases have either been determined or expired the value of the assets which may be realised in terms of payment of any determination premium and, hence, what assets will be available for distribution. It follows that Scheme 3 does not require the artificial prolongation of the MVLs, since it is inherent in its design and effect that in ordinary circumstances each MVL will last until all of the leases held by the SPV have come to an end.

91. Nor is there anything artificial or untoward in my view in the provision of deeds of indemnity, since there is no evidence or basis for a submission that this is either unusual or improper. It is true that unless the liquidator can be confident that his fees will be paid he may either resign or convert the liquidation to a CVL. It is also clearly true that Mr Gough would wish to avoid either of these inconvenient outcomes. Mr Gough said that from his own personal position he would not wish to be involved with a company which had gone into CVL. However, I accept Mr Chivers' submission that there is nothing sinister in the email from Mr Wiseglass. As Mr Chivers submitted, the scheme will work just as well from the point of view of avoiding business rates in a CVL as in a MVL. The only difference is that under a CVL ultimate control will pass from the member (Mr Gough) to the creditors who, leaving aside the liquidator's entitlement to his fees, are as I have said likely to be limited to the relevant local authority, insofar as there is any liability for payments other than business rates pre-MVL, and HMRC for VAT and on any profits generated from determination premiums received.

92. It is possible that the liquidator might conclude that in certain cases the amount likely to be received under the remaining leases is less than the likely costs of the MVL if he waited for all of the leases to expire and the claims of all of the creditors, so that he might conclude that it was appropriate to bring the MVL to an end before all of the leases had expired. However, there is no evidence that in any of the cases investigated by Mr Simpson this might have happened but for the payment of fees by the Companies or but for the comfort of a deed of indemnity. To the contrary, the evidence shows that in the majority of cases the leases have

indeed been determined early with determination premiums being paid with the result that the financial viability of the MVLs concerned has been healthy.

93. It is alleged in [65] that the determination premium is "in reality a device to continue the MVLs". The particulars rely on the break penalty provision in the PAGAPL fee agreements and the fact that the provisions for payment of determination premium have the effect of continuing the MVLs for the term of the leases. The Companies have never disputed that the purpose of the determination premium provision is to enable the MVLs to be continued until the leases are determined by early termination of expiry. The essential question, which I consider below, is whether or not this is objectionable in the context of the complaint about the Common Element.

94. As regards the break penalty provision, I accept that where it is present in the PAGAPL SPV leases it does mean that the landlord will be reimbursed the vast majority of any determination premium paid by him. I also accept that this does make it even more clear that the determination premium is an artificial construct, since under this version of Scheme 3 the landlord will in fact pay very little more than it has already agreed to pay under the fee agreement, namely 30% of the rates liability avoided each month to PAGAPL. However, the fact remains that the SPV receives the determination premium and PAGAPL has no right to reimbursement from the SPV of the amount which it has to pay to the landlord to refund the determination premium which it has paid the SPV. Thus, as between the SPV and the landlord it is still a genuine legal obligation which requires monies to flow from landlord to the SPV and which creates no repayment liability upon the SPV. I do not consider that it is objectionable as such. Although Mr Chaisty suggested that Mr Gough agreed in cross-examination that it was wrong I consider that what he was actually referring to was that it would have been wrong for PAGAPL to pay the determination premium to the liquidator, as opposed to the landlord being under a (genuine) contractual obligation to pay the determination premium to the SPV. Moreover, on my findings, the break penalty provision has not been continued on a concealed basis by MBV.

95. It is alleged in [66] that the leases are artificial. The particulars are that notwithstanding the terms of the recitals and notwithstanding that the SPV rather than the landlord is made liable for business rates under the lease in fact the landlord was invoiced for and paid the business rates for the period up to entry into MVL.

96. As I have already said the Companies do not dispute that the leases are artificial in the sense that they are not reflective of a commercial arms-length transaction which would have been entered into other than for the purpose of avoiding liability for business rates.

97. It is also common ground that the initial reverse premium provisions of the leases operate in fact so as to require the landlord to put the SPV in funds to pay business rates from the date of the lease to the date of entry into the MVL and that this is to ensure that Scheme 3, under which there is a time lapse between the lease and the MVL, remains effective because the SPV is not under a liability for business rates which it is unable to pay. However, I do not consider that there is anything particularly objectionable about this. It would appear that the letters sent to the local authority upon the SPV going into liquidation make it quite clear that the SPV is liable

for business rates for the period prior to its going into MVL and there is no suggestion nor basis for a submission that the lease, by failing to make clear that the reverse premium is intended to indemnify the SPV against its liability for business rates pre-MVL, is misleading in a material way or otherwise objectionable.

98. Reference is made: (a) in [67] of the petitions, to the SPV invoicing the landlord for business rates and services before the lease had been granted; and (b) in [68] of the petitions, to the SPV invoicing the landlord for business rates and services even though there was no provision in the lease for services. As to (a), there is no dispute that the invoices preceded the leases because the agreement had already been made in principle and because it was important for the SPV to be paid before going into MVL. No particular conclusion is stated to follow from this and in my view no adverse inference is capable of being drawn, other than the desire to ensure that the MVL does not become ineffective because the liquidator cannot be satisfied that the SPV has sufficient funds to meet that initial rates liability. As to (b), this relates to the MBV SPVs where there is no contractual provision for services but they are provided outside of the lease. Again, no particular conclusion is stated to follow and nor is any adverse inference capable of being drawn. It would appear that these particulars were intended to meet in advance any argument by the Companies that the provision of services rendered the leases non-artificial but, as I have said, that argument has not in fact been pursued.

99. Finally, in [69] it is said that the determination premium provision is uncommercial because although the lease is a wasting asset the amount payable increases inversely to the length of the remainder of the lease. This is not disputed by the Companies, nor could it be and, as I have said, the Companies admit that the lease as a whole and the determination premium provisions in particular are artificial. Again the real issue, which returns to the arguments advanced in [61] to [63], is whether the presence of the Common Element renders Scheme 3 a misuse of the insolvency legislation and process.

100. So far as the replies to the requests for further information are concerned, it is necessary for me simply to observe that in them the SOS: (a) confirmed that the sole ground for alleging a want of commercial probity is the insolvency misuse ground; (b) confirmed that she did not rely upon a breach or contravention of any particular provision of the Insolvency Act or statutory or other instrument relating thereto; (c) confirmed that instead she relied upon the policy behind the Insolvency Act, namely the collection, realisation and distribution of assets to facilitate the orderly winding up of the company, which she said was apparent from a reading of the insolvency legislation and rules (which the second reply clarified was a reference to the "body and the principles of the insolvency legislation"); (d) stated that in [63] the SOS was complaining of a "contrived creation of assets solely for the purpose of a planned, inevitable and intended liquidation"; and (e) confirmed that the ground for winding up was the operation of Scheme 3 and not the conduct of the liquidators.

(I) The purpose of members' voluntary liquidation (MVL)

101. Given the case advanced by the SOS the first of Mr Chivers' submissions was that on a proper analysis of the insolvency legislation it cannot be said that the sole legitimate purpose of an

MVL is the collection, realisation and distribution of the assets of the company. His submission is that: (a) there is a fundamental difference between the MVL, which is a solvent winding up conducted solely for the benefit of the members of the company, on the one hand and the CVL, which is an insolvent winding up conducted primarily for the benefit of the creditors of the company, on the other; (b) although the statutory provisions in relation to MVLs are to be found in the Insolvency Act, their historical origins originate in the companies legislation and they are now to be found in the Insolvency Act purely for convenience, given their historical association with CVLs, rather than because they have anything to do with insolvent companies; (c) there is no express provision in the Insolvency Act or associated provisions which states that the collection, realisation and distribution of assets is the sole purposes of an MVL; (d) there is no basis either in the Insolvency Act or in authority or elsewhere for concluding that the collection, realisation and distribution of assets is the sole purposes of an MVL; and (e) it follows that the insolvency misuse argument advanced by the SOS is flawed from the outset as is, he contends, the analysis and conclusion of Norris J in the PAGMS case insofar as it can properly be read as laying down any general principle to that effect.

102. Mr Chivers took me back to the Companies Act 1862 as the starting point for his submissions on this point. A company registered under the 1862 Act could be wound up voluntarily in the circumstances prescribed by s.129, which were as follows:

> "(1) Whenever the Period, if any, fixed for the Duration of the Company by the Articles of Association expires, or whenever the Event, if any, occurs, upon the Occurrence of which it is provided by the Articles of Association that the Company is to be dissolved, and the Company in General Meeting has passed a Resolution requiring the Company to be wound up voluntarily:
>
> (2) Whenever the Company has passed a Special Resolution requiring the Company to be wound up voluntarily:
>
> (3) Whenever the Company has passed an Extraordinary Resolution to the Effect that it has been proved to their Satisfaction that the Company cannot by reason of its Liabilities continue its Business, and that it is advisable to wind up the same."

103. Thus, in two of the three cases where a voluntary winding was permitted under the 1862 Act there was no pre-condition of insolvency. Moreover, generally speaking, the liquidator was appointed by the members and its proceedings were conducted without any representation on the part of the creditors.

104. He next referred me to the 1925 Greene Committee Report which recommended introducing the distinction between members' (solvent) liquidation and creditors' (insolvent) liquidation, and to the provisions of the Companies Act 1929 which enacted those recommendations and established for the first time the CVL. He submitted that the distinction between the two types of voluntary winding up has remained ever since and that although the provisions governing both are now to be found in the Insolvency Act the distinction remains between the two as does

the fact that the MVL remains a creature of the companies legislation and is not strictly speaking part of the wider insolvency regime.

105. He took me through the relevant provisions of the Insolvency Act, beginning with the distinction in s.73 between the regime applicable to voluntary winding up and that applicable to winding up by the court. As regards voluntary winding up there are still in s.84 the same three categories where winding up may occur, namely under the articles, solvent winding up and insolvent winding up. There is nothing in s.84 which specifies the purpose(s) for which these three categories of winding up may occur. So long as the case falls within s.84 which, in the case of a MVL, requires no more than the passing of a special resolution, the underlying purpose of the members in so resolving is immaterial. A certificate of solvency from the directors under s.89 is what is required for the winding up to be a MVL; otherwise the winding up will proceed as a CVL.

106. The provisions applicable to MVLs are to be found in Chapter III. Section s.91(1), provides that the company in general meeting shall appoint a liquidator for the purpose of winding up of the company's affairs and distributing its assets. Mr Chivers submits that this does not establish that this is the sole purpose of the MVL, as opposed to the purpose for the appointment of the liquidator. He submits that this follows from the fact that under s.91(2) the company in general meeting may sanction the continuance of some or all of the powers of the directors and there is no suggestion that the directors are subject to the same statutory purpose as the liquidator. Moreover it is the liquidator who is obliged to: (a) produce an annual progress report under s.92A; (b) make an account of the winding up as soon as the company's affairs have been fully wound up under s.94; and (c) make and send a statement of affairs under s.95 if he considers that the company will be unable to pay its debts so as to trigger the procedure for converting the MVL to a CVL.

107. He recognises, however, that there are no material differences between these provisions and the equivalent provisions applicable to CVLs and also that s.107, which applies to both kinds of voluntary winding up, provides that: "the company's property in a voluntary winding up shall on the winding up be applied in satisfaction of the company's liabilities pari passu and, subject to that application, shall be distributed among the members according to their rights and interests in the company".

108. In my judgment the combined provisions of s.91(1) and s.107 amply justify the conclusion reached by Norris J that the purpose of a voluntary liquidation, whether an MVL or a CVL, is to collect, realise (where appropriate) and distribute the assets. Subject to the argument founded on s.110 which I consider next it is my opinion that these provisions show clearly that this is the purpose of voluntary liquidations and there are no other provisions of the Insolvency Act as applicable to MVLs which indicate any other purpose. With respect to Mr Chivers, in my view there is no sensible basis for distinguishing between a specific stated purpose and the purpose which is to be discerned from s.91(1) and s.107, albeit that the former is stated by reference to the company's purpose in appointing a liquidator to undertake the process of winding up the company.

109. Mr Chivers however also sought to draw considerable assistance from the provisions of s.110, which also applies to both kinds of winding up. It applies where the company proposes to sell some or all of its business or property to another company (or LLP). It permits the liquidator, with the sanction of the members in a MVL or the creditors in a CVL, to receive (and I summarise) shares in or other benefits from the acquiring company and allows that sanction to be obtained before the company goes into voluntary winding up or before liquidators are appointed.

110. Mr Chivers submits that the combined effect of these provisions is that it is perfectly lawful for the members of a solvent company to put the company into MVL for the purpose, decided upon and sanctioned in advance, of transferring its assets to another company in return for them receiving shares or other benefits in that company. He also submits that this purpose cannot sensibly be described as being either solely the winding up of the company's affairs and distribution of its assets or solely the collection, realisation and distribution of assets.

111. I am unable to accept this submission, since it does not seem to me that the provisions of s.110 are materially inconsistent with either s.91(1) or s.107, in that s.110 simply permits the property of the company which is to be distributed among the members to comprise of or to include shares or other benefits in the acquiring company. It does not alter the fact that the assets are collected and realised where necessary and distributed among the members after liabilities have been paid.

112. Mr Chivers referred me to a number of cases in support of a submission that as a matter of principle there is nothing inherently wrong or unusual about the incorporation of a SPV to act as an asset shelter or for the purposes of furthering some artificial transaction designed to avoid tax and that this does not involve a misuse of the companies legislation. I accept this submission, which is I accept borne out by the authorities. However it is different of course from the conclusion by Norris J at [67] of his judgment that the use of a company <u>in liquidation</u> as an asset shelter is objectionable.

113. Mr Chivers also submitted that, consistent with this principle, as a matter of fact it is commonplace for SPVs to be placed into MVL for the purpose of avoiding or minimising tax liabilities. He referred me by way of example to three cases in which this had happened without apparent challenge or adverse comment, namely *Barnsley v Noble* [2014] EWHC 2657 (Ch), at [3], per Nugee J (affirmed on appeal at [2017] Ch 191), *Burnden Holdings (UK) Ltd v Fielding* [2018] AC 857, at [7], per Lord Briggs JSC and *Lowe v Revenue and Customs Commissioners* [2019] UKFTT 367 (TC), at [23]-[25], per Judge Connell. He also referred to the examples given by Mr Stanley in his evidence.

114. Accordingly, Mr Chivers submitted, it is both extremely common and perfectly lawful for companies to put themselves into MVL, where the statutory criteria are satisfied, in order to effect a s.110 scheme or otherwise to obtain a lawful tax advantage and where it cannot sensibly be said that the sole purpose is the winding up of the company's affairs and distribution of its assets or the collection, realisation and distribution of assets.

115. However it seems to me that the weakness in this argument is that in none of the examples given either in the cases or the evidence of Mr Stanley was it evident that the purpose of the MVL itself was not to collect and realise where necessary and distribute the assets of the company, even if the motive for incorporating the company or transferring assets to it or placing the company into MVL was to obtain a lawful tax or other advantage. None of the cases or examples given involves the company, whether acting by its liquidator or otherwise, simply sitting on the assets of the company and maintaining them in MVL with no intention of either realising them or distributing them to the members. In my judgment it cannot be said that holding assets in a SPV whilst it is in a MVL, without taking any steps to realise them where necessary or to distribute them to the members, can fall within the purpose of a MVL.

116. Nonetheless, in my judgment Mr Chivers is on stronger ground where he contends that the court ought not to be concerned with the motives of those involved where a company is put into MVL, so long as it can be demonstrated by reference to objective evidence that the purpose of the MVL is indeed the collection and realisation (where necessary) and the distribution of genuine (as opposed to sham) assets. It should not matter if the motive of those involved in so doing is to enable the company in MVL to act as an asset shelter or for the purposes of furthering some artificial transaction designed to avoid tax, since this does not involve the misuse of companies legislation or the insolvency legislation so long as the MVL does nonetheless objectively and without sham transactions involve the collection and realisation (where necessary) and distribution of its assets.

(J) Application of the above principles to the facts of this case

117. As I have already recorded and, insofar as necessary, found there is no dispute that the incorporation or acquisition of the SPVs, the entry into the leases and the putting of the SPVs into MVL are all legally effective transactions as opposed to sham transactions, even though: (a) they are all pre-arranged; (b) the leases are artificial in the sense that they are not the product of an arms-length negotiation, contain non-commercial terms and have no purpose other than to enable the landlords to avoid paying business rates; and (c) the entry of the SPVs into MVL is also artificial in the sense that the motive of Mr Gough as their sole member is simply to engineer the situation whereby the landlords are able to avoid paying business rates and the Companies to obtain fees.

118. Importantly, even though the determination premium provisions of the leases are themselves artificial (in that as described above they: (1) are not the product of an arms-length negotiation; (2) are uncommercial; (3) have no purpose other than to engineer a situation where the liquidator can justifiably continue the MVL until all of the leases are either determined or expire and, thus, enable the landlords to avoid paying business rates and the Companies to obtain fees), nonetheless they are not sham transactions, because: (i) they are legally effective terms of a legally effective lease; (ii) the landlords do expect to and do actually pay these determination premiums to the liquidators of the SPVs, notwithstanding that: (a) in relation to the PAGAPL SPVs they were entitled to be reimbursed by PAGAPL under the fee agreements and were so reimbursed either by PAGAPL or by MBV; and (b) in relation to the MBV SPVs they were on

some occasions at least reimbursed by MBV, either directly or indirectly, even though there was no obligation to do so in the fee agreements.

119. Furthermore, and equally importantly, the liquidators of the SPVs were and are genuinely entitled to decide that because of the existence of the determination premiums it is (save in exceptional circumstances which so far have not occurred) appropriate to continue the MVLs until all of the leases are either determined or expire. This process does indeed genuinely therefore involve the collection of assets with a view to their distribution among the members once all liabilities have been discharged. Although that has the convenient intended effect that the liquidators must wait until all of the leases are either determined or expire before they can safely conclude that they have indeed collected all of the potential assets of the SPV, there can be no criticism of the liquidators in waiting in those circumstances. Therefore, although this is also again a wholly artificial process, where all involved are fully aware that the motive and effect is to avoid business rates, the liquidation is a genuine process whose purpose is indeed the collection, realisation and distribution of assets.

120. In my judgment there can be no proper objection, whether as a matter of the business rates legislation or the insolvency legislation, and whether by reference to specific statutory provisions or an application of the *Ramsay* principle or otherwise (and where the GAAR does not apply), to the members of a company putting the company into MVL for the purpose of avoiding business rates after creating and placing an artificial asset (in this case, the lease containing the determination premium) into the tax "shelter" created by the company being in MVL, so long as putting the company into MVL and maintaining the company in MVL is, considered objectively in law and in fact, for the purpose of the collection, realisation and distribution of the assets of the company. That is not contrary to the general purpose of the insolvency legislation or to any specific provisions of the insolvency legislation applicable to MVLs. Here that is indeed what is happening in my judgment, notwithstanding that the scheme is an artificial construct designed and implemented solely in order to avoid rates liability.

121. In my judgment the existence of the determination premium provisions amounts to a substantial and a significant difference between Scheme 2 and Scheme 3 which justifies my reaching a conclusion different to that reached by Norris J in the PAGMS case. In Scheme 2 there was never any asset which had any realisable value held by the SPVs either at the time it went into MVL or subsequently. The liquidators had no real expectation of realising any value from exploiting the leases as items of intangible property owned by the SPVs. It is clear from the judgment of Norris J that, appreciating this, they took no steps at all to seek to do so. They were effectively nominal liquidators who took no steps to achieve the purpose of the MVL. The judgment of Norris J shows that when the liquidators became concerned as to their position, in the light of the risk that they might be reported to their professional regulator, PAGMS took steps to dissuade them from taking any positive action and eventually removed them without immediately replacing them. Furthermore, once replacement liquidators were in place, whilst they converted the MVL to a CVL, believing that this would address the concerns expressed, they took no active steps to market or otherwise realise the leases. The end result was that the MVLs continued solely for the purpose of allowing the property to be owned by a company in

liquidation and not for the purpose of collecting or realising assets for distribution. That is therefore a very different case on the facts from the present.

122. Mr Chaisty's submission is that, notwithstanding these differences between Schemes 2 and 3, since the determination premium provisions are purely artificial and intended to have precisely this effect the court can and should disregard them and thus treat the schemes as substantially the same. However, for the reasons I have already given, it is not possible simply to disregard these provisions on the basis that they are "artificial".

123. I accept, of course, that the court when exercising its jurisdiction in relation to public interest winding up petitions is exercising a wider jurisdiction which goes beyond simply deciding whether or not Scheme 3 complies with the provisions of the business rates legislation and/or the insolvency legislation and which might, in appropriate cases, involve reaching a conclusion that a particular activity, legal in itself but involving the use of artificial transactions, was lacking in commercial probity in a way which was contrary to the public interest and which justified the company being wound up.

124. However, as Mr Chivers submits, it is important that such a decision is made on the basis that the ways in which the activity lacks commercial probity and is contrary to the public interest are identified so that it can clearly be seen how and on what basis the exercise of this jurisdiction is justified.

125. I accept Mr Chivers' submission that it cannot be said and, indeed, is specifically not said by the SOS that to devise and implement a lawful scheme to avoid business rates is itself lacking in commercial probity or otherwise contrary to the public interest. It is obvious that there is legitimate scope for disagreement about this. Local authorities and many members of the public would doubtless strongly believe that rates avoidance is contrary to the public interest and that companies whose business it is to earn healthy profits by enabling property owners to avoid paying business rates on vacant property are lacking in commercial probity. The property owners who use the services of the Companies and other similar schemes doubtless strongly disagree. The court cannot make a decision one way or another. It is clear from the material which Mr Chivers put before me that the business rating system in general and rates avoidance schemes on empty property in particular is the subject of consideration and consultation by government and that differing approaches are being taken in England, Wales and Scotland. There is no evidence of harm to individual members of the public or to anyone or anything through the activities of the Companies other than a reduction in the monies which would otherwise be paid into the coffers of the local authorities. The court cannot rule upon the extent of the loss suffered by the general public either within the local authority area or more generally since it would depend on an investigation as to: (a) whether or not landlords might simply use other similar schemes if the Companies were wound up; (b) whether or not landlords might simply use different avoidance schemes if the result of this judgment was to close the insolvency schemes so far at least as limited companies promoting the scheme were concerned; (c) what wider losses might result if one way in which landlords could avoid payment of business rates on empty property was removed. In those circumstances it would be wrong for the court to conclude on this basis that Scheme 3 is inherently objectionable or that the Companies are

operating in a way which is seriously lacking in commercial probity or against the public interest.

126. Moreover, and importantly, I also accept Mr Chivers' submission that it cannot be said that to devise and implement a lawful scheme to avoid business rates which involves the use of the insolvency legislation and process through the use of the MVL in a way which is consistent with the purpose of MVLs, even though that is achieved through the intended creation of a lease containing a term (the determination premium) which artificially creates an asset, is lacking in commercial probity or otherwise contrary to the public interest. In my judgment that would not be consistent with the accepted general principle that it is perfectly proper for companies as artificial constructs to be incorporated with a view to obtaining a fiscal advantage, to create or have transferred to them assets which are artificial from a commercial perspective to achieve the same purpose and/or to be placed into liquidation, again artificially from a commercial perspective to achieve the same purpose, so long as each transaction is a legally genuine and effective transaction and not a sham and so long as each step in the transaction is in accordance with, and not contrary to, the general purpose or a specific purpose of the legislation governing such transactions.

127. In my judgment there has to be something more to justify a finding that the operators of such a scheme are not acting with commercial probity or otherwise contrary to the public interest.

128. In the case of Scheme 2 there clearly was, as I have identified, significantly something more. Here, in my judgment, there is not.

129. Mr Chaisty submitted that since the first two elements of the objectional elements of Scheme 2 identified by Norris J in his judgment at [65] are also present here (namely, the creation of the SPVs for the sole purpose of their going into MVL and the creation of leases for the sole purpose of their being held by the SPVs in MVL) it matters not that the two remaining objectional elements identified by him are not (namely, the control exercised by PAGMS over the liquidation and the exercise of that control to secure the continuance of the liquidation), and there is still a misuse of the insolvency legislation. I am unable to accept this submission since in my judgment:

    (a) Mr Chivers is right when he submits that this paragraph of this judgment should not, with respect to Norris J, be treated as the equivalent of a statutory checklist where it is sufficient if any one or more of the identified features are present, nor could Norris J ever have intended that it should be used in such a way;

    (b) What Norris J was really identifying at [65] to be objectionable was that the "real objective" was that "each liquidation shall act as a shelter for the assets specifically created to be held by the company", because that was contrary to the purpose of liquidation as being the collection, realisation and distribution of assets. In my view what was crucial in that case was that there was no collection, realisation and distribution of assets intended or effected in the voluntary liquidations operated by PAGMS so that the

only purpose of those liquidations was for them to operate as a shelter for assets which were not being collected, realised or distributed. That, as I have said, is not the case here.

(c) The insolvency legislation is not misused where the MVLs do indeed involve the collection, realisation and distribution of assets, even though the process is designed to achieve that objective and deploys the use of artificial assets for that very purpose. Alternatively, to the extent that it might be said that there is a misuse, it is not sufficiently reprehensible when set against the whole of the factual and legislative context to justify a conclusion that the activities of the Companies are so clearly lacking in commercial probity or otherwise so clearly against the public interest as to justify their being wound up on public interest grounds.

130. For those reasons I am not satisfied that the SOS has made out her case for a public interest winding up order against either of the two Companies.

131. For completeness, I should say that I reach that conclusion even on the basis that PAGAPL's business activity involved it agreeing to reimburse and actually reimbursing the landlord the amount of the determination premium which it paid. In my view that is not key to the success or failure of the petitions, on the basis that in reality it simply represents just one element of the commercial price paid by the landlords to the Companies for participating in the Scheme; if instead of agreeing to reimburse the landlord PAGAPL had simply agreed to charge say 25% as opposed to 30% of the business rates saved, to reflect the risk that the landlord might in a given case exercise the determination right and become liable to pay the determination premium, that would not seem to me to tip the balance.

132. If, however, contrary to that conclusion, it did tip the balance between what was and what was not lacking in commercial probity or otherwise against the public interest in such a way as to justify winding up, then it would have followed that the SOS would have made out its case as against PAGAPL but not as against MBV.

133. If, contrary again to my conclusions, MBV's business activity also involved it doing the same thing in all or the vast majority of cases, then the SOS would also have made out its case against MBV. At that point I would have needed to consider the fallback submission made by Mr Chivers that I ought to allow the Companies to offer undertakings instead of winding them up. On this hypothesis that might have involved their undertaking to desist from either offering or agreeing to reimburse some or any part of the determination premiums paid by the landlord, whether directly or indirectly. Since it was agreed that the question of the acceptability of and the terms of any undertaking were best left over for further submission once I had given my judgment on the key issues I say no more about it in this judgment, other than to indicate that in principle I would have been amenable to accepting undertakings if, as I say, it was this feature alone which tipped the balance against the Companies.